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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1646

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ALAN JONES and CRAIG LEE McCRACKEN,  
*Petitioners,*

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE  
COMPANY, a corporation,  
*Respondent.*

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**REPLY TO PETITIONERS' RESPONSE TO BRIEF IN  
OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS, TENTH CIRCUIT**

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ELLIOTT C. FENTON and  
LARRY D. OTTAWAY  
FENTON, FENTON, SMITH, RENEAU & MOON  
405 Midland Center — P. O. Box 1638  
Oklahoma City, Oklahoma 73101

*Attorneys for Respondent,  
Farmers Alliance Mutual Insurance  
Company*

August, 1978

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**STATEMENT OF THE CASE**

A complete statement of the case is contained in Respondent's Brief in Opposition to Petition for Writ of Certiorari filed herein on June 15, 1978.

**REASONS FOR NOT GRANTING PETITIONERS'  
WRIT OF CERTIORARI**

This Brief has been required by the Petitioners filing of a responsive pleading to Respondent's Brief in Opposition to Petition for Writ of Certiorari. In their Brief, Petitioners cite *for the first time* certain authorities, which they contend support their request for writ of certiorari. This Brief will be limited to a review of those authorities.

*American Fidelity & Casualty Co. v. Service Oil Co., Inc.*, 164 F.2d 478 (4th Cir. 1947), cited by Petitioners is not applicable to this case. There, the carrier raised as the issue to be decided in the declaratory judgment suit the identical issue to be decided in the pending State Court action.

"Counsel for the company . . . have prepared answers for filing in the state court which deny liability on the part of the insured on the same principal ground asserted by the company in the suit for declaratory relief. . . ." 164 F.2d 478 at 479.

In the case now before this Court, the status of Mr. Shippey as a permissive user was not an issue in the action pending against his estate in State Court. The federal declaratory judgment procedure used by Respondent to adjudicate the status of Mr. Shippey under plaintiff's policy with Spann Chevrolet, therefore, did *not* require two suits to decide what would have been decided in one suit as the case in all of the opinions relied upon by Petitioners. There is no conflict among the circuits on this point and no reason for certiorari.

Petitioners now argue that 47 O.S. § 7-324(f) (1) and 47 O.S. § 7-601 mandate reconsideration. These statutes were *not* cited by Petitioners before the Trial Court, the Tenth Circuit Court of Appeals or in their Petition for Writ of Certiorari before this Court. It is difficult to understand how Petitioners can request this Court grant certiorari on authorities never presented to or on issues not decided by the Trial Court or the Tenth Circuit Court of Appeals. Even if Petitioners' contentions were well taken, they have been waived by failure to previously assert them. *Namet v.*

*U. S.*, 373 U.S. 179, 83 S.Ct. 1151 (1963). However, Respondent feels obligated to answer these assertions since they are not valid.

47 O.S. § 7-324(f) (1) provides:

"1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury to damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy." [Emphasis ours]

In this case, a determination has been made that the injury complained of was *not* covered by Respondent's policy. Further, it was *not* a statement by the insured which defeated coverage. It was the fact that the driver of the vehicle at the time of the accident was not a permissive user under the terms of the "Persons Insured" section of the policy involved. Coverage was not defeated or voided by any statement of the insured. Respondent's policy simply provided no coverage for Mr. Shippey at the time of the accident because of his status as a nonpermissive user. The statute relied upon was designed to prevent carriers from denying coverage as a result of statements made by an insured after an accident, i.e., admissions of liability which might be asserted as a breach of duty to cooperate under the policy. The statute does not prevent an insured from testifying to facts surrounding the use or misuse of the vehicle.



Finally, Petitioners argue that Oklahoma has adopted by passage of 47 O.S. § 7-601 a policy of requiring mandatory insurance which prevents carriers from denying coverage in all situations. The statute upon which Petitioners rely became effective over six (6) months after the date of the accident involved herein. Further, policies excluding coverage for nonpermissive use are approved by this State and such restrictions do not conflict with the definition of a policy contained in subpart (1) of § 7-601. This statute is not designed to create coverage where it does not exist under the provisions of the policy itself.

#### CONCLUSION

Petitioners' request for writ of certiorari should be denied.

Respectfully submitted,

ELLIOTT C. FENTON and  
LARRY D. OTTAWAY  
FENTON, FENTON, SMITH, RENEAU & MOON  
405 Midland Center — P. O. Box 1638  
Oklahoma City, Oklahoma 73101

*Attorneys for Respondent,  
Farmers Alliance Mutual Insurance  
Company*

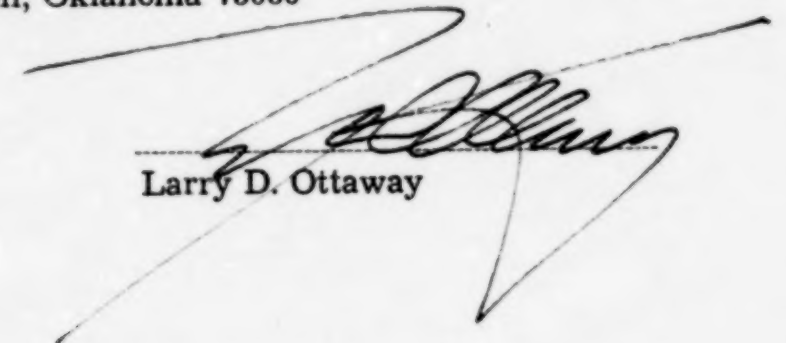
August, 1978

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY TO PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT was mailed on this 21st day of August, 1978, by depositing same in the United States Mails, postage prepaid, to:

Thomas G. Smith  
P. O. Box 146  
Purcell, Oklahoma 73080  
Attorneys for Petitioners

Charles B. Grethen  
Attorney-at-Law  
P. O. Drawer D  
Purcell, Oklahoma 73080



Larry D. Ottaway